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In the

Supreme Court of the United States

OCTOBER TERM, 1948

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No. ~~771~~

LESTER E. BANNING,
Petitioner and Cross-Respondent,
vs.
DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner

CROSS-PETITION FOR WRIT OF CERTIORARI AND BRIEF OF RESPONDENT AND CROSS-PETITIONER IN REPLY TO THE PETITION OF LESTER E. BANNING FOR A WRIT OF CERTIORARI, AND IN SUPPORT OF CROSS-PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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No. 771

LESTER E. BANNING,
Petitioner and Cross-Respondent,
vs.
DETROIT, TOLEDO & IRONTON RAILROAD COMPANY,
Respondent and Cross-Petitioner

CROSS-PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Detroit, Toledo & Ironton Railroad Company, the above named respondent and cross-petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered on April 5, 1949, whereby said court refused to vacate an order of the District Court overruling cross-petitioner's motion for judgment notwithstanding the verdict of the jury in said cause.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 1254-(1) of Title 28, United States Code, as enacted by the Eightieth Congress, Second Session, 1948, effective September 1, 1948, and Rule 38-(5) of the Rules of the Supreme Court.

The judgment of the Court of Appeals was entered April 5, 1949 (R. 405).

Lester E. Banning, the plaintiff in the cause in the District Court, has heretofore filed a petition for writ of certiorari to review the same judgment and in connection therewith has filed a printed transcript of the record, to which the citations of the record hereinafter made refer.

STATEMENT OF THE MATTER INVOLVED

The District Court of the United States for the Eastern District of Michigan, Southern Division, on April 2, 1948, entered a judgment in favor of the plaintiff Banning against defendant, this cross-petitioner, in the sum of Forty-One Thousand Dollars ($41,000.00), in accordance with the verdict of the jury rendered in said cause (R. 390).

Cross-petitioner, defendant below, appealed to the United States Court of Appeals for the Sixth Circuit, claiming that the District Court erred in refusing to grant cross-petitioner's motion for judgment notwithstanding the verdict and in refusing, in the alternative, to grant its motion for a new trial predicated upon certain alleged errors committed by the trial court.

The Court of Appeals reversed the judgment of the District Court upon finding that it had committed four separate and material errors and ordered the case re-

manded to the District Court for a new trial, but refused to order judgment entered for the defendant railroad company notwithstanding the verdict.

The sole error of the Court of Appeals here complained of by cross-petitioner in its refusal to order judgment entered for cross-petitioner notwithstanding the verdict.

Two separate and distinct issues of negligence, and only two such issues, were submitted by the District Judge to the jury (R. 331) almost verbatim in the language requested by plaintiff's counsel (R. 351) as follows:

> "Plaintiff has charged in his complaint that the defendant failed to furnish him a safe place in which to work, in two respects; first, that he was directed and required to work in the yard under muddy conditions, so that his boots became slippery and covered with mud; and, second, that defendant dropped the car upon which plaintiff was riding in the performance of his duties, at such a high, dangerous and excessive rate of speed that plaintiff did not have the opportunity to bring it to a stop by means of the braking apparatus which he was required to operate before it collided with the train of parked cars standing upon the track, with brakes set, so that plaintiff was thrown therefrom to the ground and road bed, sustaining injuries complained of."

The Court of Appeals found that there was not sufficient evidence to warrant the submission to the jury of the first of these two issues, relative to directing and requiring the plaintiff to work in the yard under muddy conditions, but it held that there was sufficient evidence to warrant the submission of the issue of negligence based upon alleged excessive speed at which the box car was dropped or switched. It is cross-petitioner's contention that there was not sufficient evidence to warrant the submission of

this issue of excessive speed, and that therefore the case should have been taken from the jury and a verdict directed for defendant railroad company.

The manner in which the accident happened and in which plaintiff was injured is in general set forth in the opinion of the Court of Appeals (R. 406-409) and a portion of this statement thereof is repeated in the petition for writ of certiorari filed by plaintiff Banning (pp. 2-4). In our brief filed in connection herewith we set forth in detail the facts relating to this issue of alleged excessive speed.

QUESTION PRESENTED

The sole question presented by this cross-petition is whether there was sufficient evidence to warrant the submission of the alleged issue of excessive speed to the jury.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The United States Court of Appeals for the Sixth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

2. The Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

3. There was not sufficient evidence to take any issue of negligence to the jury, and if the Court of Appeals had correctly decided the alleged issue relative to excessive speed, it would have directed a judgment to be entered in favor of the defendant railroad.

Wherefore, it is respectfully submitted that this cross-petition for a writ of certiorari to review the judgment of the Court of Appeals should be granted.

Dated: May 20, 1949.

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BRIEF OF RESPONDENT AND CROSS-PETITIONER IN REPLY TO THE PETITION OF LESTER E. BANNING FOR A WRIT OF CERTIORARI, AND IN SUPPORT OF CROSS-PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN REPLY TO PETITION OF LESTER E. BANNING FOR WRIT OF CERTIORARI

Failure to Question Rulings of Court of Appeals is Fatal to Banning's Petition

From a reading merely of Banning's petition and the brief in support thereof, one would gather that the appeal from the District Court was based solely on the

claimed errors of the trial court in submitting each of the two issues of alleged negligence and that the Court of Appeals reversed the case and sent it back for a new trial solely on the ground that one of these issues was incorrectly submitted. Actually, in addition to the two claims of error, in respect of the submission of each of these two issues, appellant railroad company also claimed that four other separate and distinct errors were made by the District Court in the admission or rejection of testimony during the trial. Actually, the Court of Appeals found not only that the District Court committed error in submitting one of the two issues to the jury, but that it committed three separate errors in regard to the reception and rejection of testimony.

In addition to the error found by the Court of Appeals in the submission by the District Judge to the jury of the alleged negligence in directing Banning to work in the yard under muddy conditions, the other three errors which the Court of Appeals found the District Judge to have committed during the course of the trial are sufficiently shown by the following excerpts from the opinion of the Court of Appeals (R. 411-412):

> "Banning was permitted to testify, over Appellant's objection, that he had never ridden on a freight car that came into contact with another portion of the train at as high a rate of speed as the one involved in the accident. He had made some 25 or 30 flying switches previously. No foundation was laid to show the circumstances, distance, grade or other conditions of such previous operations. We believe the testimony was improperly admitted. Several factors can affect the speed at the time of impact, variable under different operations, irrespective of the initial speed given to the free rolling cars. It is a well established rule of evidence that circumstances under which other comparable con-

duct occurs, should be substantially similar. *Wigmore on Evidence,* 3rd Ed., Vol. II, Sec. 459, 460; *C. & O. Ry. Co. v. Thomason,* 70 Fed. (2) 860, C. A. 6th; *People v. Gotshall,* 123 Mich. 474, 479; *Trask v. Boston & Maine R. R.,* 219 Mass. 410, 415.

"The District Judge sustained objections to questions addressed by Appellant's counsel to the conductor and engineer asking whether in their opinion the drop switch was or was not a normal one. In each instance the indicated answer was that it was a normal one. Both witnesses had years of experience. The general rule permits a witness who is experienced in technical matters and qualified to do so, to give his opinion in a matter which is not one of common knowledge, although it involves an ultimate fact to be finally decided by the jury. *Transportation Line v. Hope,* 95 U. S. 297; *Empire Oil & Refining Co. v. Hoyt,* 112 Fed. (2) 356, 360, C. A. 6th; *Wabash Screen Door v. Black,* 126 Fed. 721, 727, C. A. 6th; *Ekblom v. G. O. Reed, Inc.,* 71 Fed. (2) 399, C. A. 5th; *Walsh v. W. P. Rend Colliers Co.,* 228 Fed. 311, C. A. 7th. Appellant's contention that the general rule is applicable in the present case, in that the proper operation of a railroad involves a combination of factors not within the knowledge of the average juryman appears to have support in the authorities. *Grand Trunk Western Ry. Co. v. Lindsay,* 201 Fed. 836, 844, C. A. 7th; affirmed, 233 U. S. 42; *Chicago G. W. Ry. Co. v. Price,* 97 Fed. 423, C. A. 8th; *Norfolk & Western Ry. Co. v. Gillespie,* 224 Fed. 316, 320, C. A. 4th; *Pittsburgh S. & N. R. Co. v. Lamphere,* 137 Fed. 20, 23, C. A. 3rd; *Union Pac. Ry. Co. v. Novak,* 61 Fed. 573, 579-580, C. A. 9th; *Bellefontaine & I. R. R. Co. v. Bailey,* 11 Ohio State 333, 335. We are of the opinion that the testimony should have been received.

"Dr. Conley's testimony should have been confined to the X-ray pictures without reference to appellee's pain, about which he had no personal knowledge."

Supreme Court Rule 38-(2) provides that "only the questions specifically brought forward by the petition for writ of certiorari will be considered." Banning has not questioned the other rulings referred to above which were made by the Court of Appeals, any one of which would necessarily result in the case having been sent back for a new trial, regardless of the court's ruling on the so-called "mud issue." There would be no point in allowing a writ of certiorari to issue for the purpose of correcting one alleged error, where other rulings made by the court below which had the same result, namely the sending of the case back for a new trial, remain uncomplained of.

A further reason for denying Banning's petition is that his complaint is merely that the Court of Appeals remanded the case for a new trial. In *Bailey v. Central Vermont Railway*, 319 U. S. 350, 63 S. Ct. 1062 (1943) three of the justices of this Court expressed the view that this Court should not undertake the review of cases under the Federal Employers' Liability Act, where no important principle of law is involved, saying "It seems to be thought, however, that any ruling which takes a case from the jury, albeit it will not serve as a precedent, is of such paramount importance as to require review here. * * * But this I do say, that this Court does not sit to redress every apparent error committed by competent and responsible courts whose judgments we are empowered to review. And, if we undertake any such task, we shall disenable the court to fulfill its high office in the scheme of our government."

Cases of this type, where the Supreme Court under its discretionary power to issue a writ of certiorari, has taken jurisdiction, are invariably those in which the decision of the court to which the writ is issued would have ended the case, had the writ not been granted. Every

case wherein a writ of certiorari was granted, as listed by Mr. Justice Douglas in the appendix to his opinion in *Wilkerson v. McCarthy*, 69 S. Ct. 413, was of this character. In the Bailey case the Supreme Court of Vermont had directed judgment to be entered for the defendant. The three members of this Court felt that even under those conditions, a writ of certiorari should not be granted. The conclusion seems inescapable that no such writ should be granted where the decision of the Court of Appeals has merely directed a new trial, and where a review of the decision by this Court would not only call upon it to determine the soundness of its ruling in respect of the submission of one issue, but would call upon it to consider numerous other rulings made by the Court of Appeals (not even mentioned by petitioner) in regard to the reception and rejection of evidence during the trial.

We submit that for the foregoing reasons, as well as those hereinafter set forth in respect of the mud issue, Banning's petition for a writ of certiorari should be denied.

The Court of Appeals Correctly Decided that the District Court Was in Error in Submitting to the Jury the Issue of the Alleged Negligence of the Railroad Company in that Banning "Was Directed and Required to Work in the Yard Under Muddy Conditions, so that His Boots Became Slippery and Covered with Mud."

Petitioner says in his brief (p. 13) that "this Court in recent cases has approved the doctrine that, if one issue or theory is properly submitted to the jury and is sustained by evidence, the general verdict should be upheld even though another issue may have been improperly submitted." This position is at variance with that taken

by counsel for Banning in the Court of Appeals, where (p. 21 of their brief filed in that court), in referring to defendant's claim that where there is more than one alleged act of negligence, an issue of negligence should not be submitted to the jury where no proof is offered of such alleged act, they state: "We have no quarrel with the rule of law laid down in these cases, but we earnestly submit that they are not in point for the simple reason that substantial evidence was introduced in the at bar, both on the question of mud, which was entirely undisputed, and on the question of the excessive rate of speed at which the flying switch was made."

The Court of Appeals followed the well-known rule that where an issue is improperly submitted to the jury because not supported by evidence, and the verdict rendered is a general one with no way to determine on which of several issues it was based, the appellant is entitled to a new trial, citing the following cases (R. 410): *Wilmington Star Mining Co. v. Fulton,* 205 U. S. 60, 77-79, 27 S. Ct. 412; *Rashaw v. Central Vermont Ry.,* 133 Fed. (2) 253, C. A. 2nd; *Roth v. Swanson,* 145 Fed. (2) 262, 269, C. A. 8th. See also *Katila v. B. & O. R. Co.,* 104 Fed. (2) 842, C. A. 6th. Other cases supporting this rule are the following: *Schilling v. Delaware & H. R. Corp.,* 114 F. 2d, 69 (CCA 2nd Circuit, 1940) and *Christian v. Boston & M. R. R.,* 109 F. 2d 103 (CCA 2nd Circuit, 1940).

In the *Rashaw* case, *supra,* the Court of Appeals, in reversing a judgment for the plaintiff under the Federal Employers' Liability Act, points out that the trial judge took occasion to state the negligence charged by the plaintiff, and that in so doing he set forth certain of the plaintiff's allegations which the plaintiff charged showed negligence on the part of the railroad. The appellate court then says:

> "This was correct so far as allegations go, but those allegations were not supported by proof sufficient to make any issue for the jury in respect to them. * * * The result is that the case was submitted to the jury upon allegations of negligence some of which were not supported by any substantial evidence whatever. This was reversible error since the verdict was general and may, for aught that now can be told, have been put upon such false issues. (Citing cases.)"

In the *Christian* case, *supra,* the Court held, in reversing a judgment under the Federal Employers' Liability Act:

> "Where two issues of negligence are sent to the jury and the verdict for the plaintiff is general, the judgment must be reversed if there was no evidence in support of one of the issues."

That this rule is especially applicable in cases under the Federal Employers' Liability Act appears from the case of *Katila v. B. & O. R. R. Co., supra.* In that case, the Court of Appeals, in an action under the Federal Employers' Liability Act, reversed a judgment in favor of plaintiff upon an appeal by the plaintiff on the ground of inadequacy of the verdict, because the lower court had *failed* to submit a certain issue, which there was evidence to support, to the jury, although it had submitted other issues. The Court pointed out that under the Federal Employers' Liability Act, the doctrine of comparative negligence had been introduced, and that the jury is permitted to reduce damages in the proportion that the plaintiff's negligence, if any, bears to the total negligence, and that:

> "* * * there may not be adequate assay of total negligence unless all negligence supported by evidence is given consideration. This would seem to

> be the command of reason as we think it is the mandate of authority." (Citing cases.)

The Court went on to say that:

> "The verdict was general and it is impossible, of course, to say in what amount damages were found or by what sum they were reduced because of negligence of the plaintiff."

In the present case, the Court duly submitted to the jury, as requested, instructions which would permit the jury to reduce any damages otherwise found in proportion to the negligence, if any, attributable to the plaintiff (R. 337).

If the claimed issue respecting the mud was improperly submitted to the jury, then, under the reasoning of the Katila case, there could not be an adequate assay of the total negligence of both parties to permit the proper apportionment as between them. But, of course ,the vice of the instruction really goes far beyond this, because, the verdict being general, we have no means of knowing what part of the verdict represents damages on account of the alleged, but unproven, negligence of the defendant in respect of the mud, nor, indeed, do we have any means of knowing that the entire verdict is not attributable to the determination of this alleged issue in favor of the plaintiff.

Nor was this alleged issue inadvertently or casually injected into the case. Let it be remembered that plaintiff specifically charged in his complaint that the defendant was negligent "in causing and directing plaintiff to assist in the switching of cars which necessitated him to alternately walk and work about on the ground when it was deep with slippery, greasy mud" (R. 3); that plaintiff specifically requested the court to submit as an issue of

negligence to the jury that plaintiff "was directed and required to work in the yard under muddy conditions so that his boots became slippery and covered with mud" (R. 351); that defendant specifically requested that this issue be eliminated (R. 357); that the lower court nevertheless gave this request almost verbatim as asked by plaintiff (R. 331); and that defendant made timely objetcion under Rule 51 to this part of the court's charge and its failure to eliminate this issue (R. 346-348).

In plaintiff's opening statement (R. 17-18), his counsel said:

> "* * * it had been raining quite constantly all afternoon, and perhaps longer than that, and that in and about the place where the plaintiff, Mr. Banning, was required to work because of the nature of his duties, the road bed on some of these tracks, that is, the road bed surrounding them and immediately adjacent where the plaintiff had to go, had become extremely muddy, wet and slippery, and as a result of which the plaintiff's boots and his feet and his shoes became and were in a damp and muddy condition, but that there was nothing he could do about it, because he had to keep on working in and around those conditions; and that those conditions by or surrounding the railroad's property there were dangerous conditions; that the danger of those conditions were known to the plaintiff—or the defendant railroad company, rather."

Defendant's counsel here objected to the claim that these conditions were alleged to be dangerous, and counsel thereupon pointed to paragraph 3 of the complaint which alleged that the defendant was negligent "in failing to furnish plaintiff a reasonably safe place in which to perform his duties as an employee."

In plaintiff's argument to the jury just before the submission of the case to it (R. 296-297), plaintiff's counsel said, among other things:

> "We based our charge of negligence on the fact that he wasn't furnished a safe place in which to work. That is a common ground consisting of two divisions. One is that they compelled him to work on grounds that were muddy on a rainy night. The mud was three or four inches deep. He got mud on his boots. That evidence is not disputed. Any evidence in this case that hasn't been disputed, you have got to take as a fact. It has not been disputed that he did work in mud three or four inches deep, sloppy mud, and that it was over his boots, and that fact contributed to his accident because his feet were slippery and when the jolt came he did not have as good a foothold as he might have had if the platform were dry, if it weren't a rainy night and if mud hadn't been on his boots. The other premise is that he was jarred off because it was an unusual jolt."

Not only did the court, over defendant's objection, send this specific issue to the jury, but throughout his instructions he emphasized the matter by repeatedly referring to the duty of defendant railroad to furnish plaintiff with a reasonably safe place in which to work (see, for example, the court's charge at pages 332, 333, 337, 338). Inasmuch as "safe place in which to work" has no application, so far as this case is concerned, to any contention other than the alleged mud on the side track, and obviously could not refer to the manner in which cars or equipment were operated by fellow employees, the court should not have used this phrase at all in its charge.

Nor do the cases cited by petitioner on pages 13-17 of his brief sustain the claim made by him that the rule of the above cited cases has been abrogated. In *Bigelow v.*

R.K.O. Radio Pictures, 327 U. S. 251, 66 S. Ct. 574, according to the opinion of the Supreme Court, the sole question for decision was whether the evidence of damage was sufficient to support the verdict. There is no indication that defendant was complaining that an issue unsupported by evidence had been submitted. The case provides no parallel to the present one.

Similarly, in *Larsen v. Chicago & N. W. Ry. Co.,* 171 F. 2d 841, defendant does not appear to have been complaining merely of the submission of an unsupported issue, but its contention was that the court erred in denying its motion for judgment notwithstanding the verdict. The case has no application.

Again, in *Miller v. Advance Transportation Company,* 126 F. 2d 442, defendant was complaining of the court's refusal to instruct the jury to return a verdict for the defendant and of the overruling of defendant's motion for judgment notwithstanding the verdict. Naturally, such claim could not be sustained if there was sufficient evidence on *any* charge of negligence.

The case of *Tiller v. Atlantic Coast Line Ry. Co.,* 323 U. S. 574, 65 S. Ct. 421 (cited by petitioner as giving tacit approval to the doctrine for which he now contends) actually tends to establish the contrary. The Supreme Court reaffirmed its previous holding that the evidence justified submission to the jury of the issues raised by the original allegations of negligence, sustaining the Court of Appeals on this point. The Court of Appeals, however, had held that there was no evidence on the other issue involving alleged violation of the Boiler Inspection Act, and had found that the District Court should therefore have directed that this issue be found in favor of the railroad. The Supreme Court discusses this question at considerable length and comes to the

conclusion that under the evidence in that case, that issue was properly submitted to the jury. If this is a tacit approval of anything at all, it is tacit approval of the rule for which we are contending, otherwise the Supreme Court would merely have found that, as it agreed with the Court of Appeals that there was evidence to support the first issue, it would be unnecessary to discuss the second.

In *Cross v. Ryan,* 124 F. 2d 883, an action for damages under the Dram Shop Act of Illinois, the questions raised by the defendant were that each count of the complaint should have been dismissed, that a verdict should have been directed, and that a new trial should have been granted on the ground of insufficiency of the evidence to support the causes of action stated in the complaint. The court held that each count stated a cause of action under the Illinois statute, and that there was substantial evidence to support the verdict. The facts in the case related only to the single matter of a drunken brawl in a saloon. The various counts were merely alternative methods of stating the liability of the proprietor for selling intoxicating liquor, and it is perfectly clear from a reading of the opinion that there was substantial evidence to support each and every count. The defendant apparently only raised the question of the sufficiency of the evidence to support the causes of action stated in a motion for a new trial, and there is no indication that he objected to the submission of any particular issue of negligence on the ground of insufficiency of evidence relating to that issue alone. In fact, notwithstanding the several different ways in which plaintiff stated his cause of action, it is clear that there was only one real issue of negligence involved, namely, the furnishing of the liquor.

Petitioner (pp. 15-17 of his brief) next makes the claim that there was substantial evidence to support the issue of negligence in respect of the alleged muddy condition of the road bed.

In support of our claim that there was no evidence sufficient to take this issue to the jury, we refer, first, to the opinion of the Court of Appeals pointing out that it is not negligence on the part of a railroad to operate merely because of a rainy day; that plaintiff had ample opportunity to clean any mud off his boots; and that what little mud he got on his boots was in an entirely different location from where the accident happened; and that the two incidents were entirely separate and distinct (R. 409-410).

On this record the following statements are not subject to dispute:

(a) Plaintiff himself, who was equipped with new boots, makes the sole claim that he had to walk in some thin mud, about two inches deep, while conducting the coupling operation of the switch engine to the two box cars on the distillery "barrel track," which was on the other side of the distillery from the place where the accident happened (R. 34, 53).

(b) That is the only place where he claims the roadbed was muddy, and he emphasized this by stating (R. 34), "That is where the roadbed was muddy."

(c) After this coupling was completed, the Diesel engine remained at that point for about five minutes and plaintiff spent three or four minutes on the rear end of the engine, where he was in a position where he could have talked to either the fireman or engineer. He remained there while the engine

proceeded north along the barrel track some 400 yards or more to where the gondola cars were standing on the quarry track (R. 35, 72-73).

(d) When plaintiff dismounted from the engine to make the coupling to the gondola cars on the quarry track, he testified that the roadbed there was "gravel and cinders, solid roadbed" and that there was no mud there (R. 36).

(e) He then stood on the metal step or "stirrup" on one of the box cars while the train proceeded along the quarry track into the main track to a point on the east side of the distillery, a distance of approximately 500 yards. He got off at this point to confer wtih the conductor, but he does not say there was any muddy condition whatsoever at that point.

(f) Plaintiff then got back on the stirrup on the box car nearest the engine and rode in that position, and so far as the evidence shows did not get off on the ground again until the accident took place some time later. In that position he rode southward as the Diesel engine pushed the two box cars approximately 300 yards before it reversed itself to make the drop switch. (The approximate distances referred to are taken from the scale drawing, Df. Ex. 4.)

(g) If plaintiff acquired some mud on his boots back on the barrel track, it is quite plain that he had every opportunity to remove it prior to the happening of the accident. He could readily have done this while the switch engine remained on the back track, or while he was riding on the engine near the engineer and the fireman, or while he was

riding on the stirrup which obviously would have constituted a perfect mud scraper (see Pl. Ex. 1).

(h) There is absolutely no evidence in the record that he at any time advised any member of the crew or anyone else that his boots had become muddy or that he asked for any opportunity to clean them off. (Although it will be noted that in his complaint he originally charged negligence in failing to give him time and opportunity in which to clean the mud from his boots (4), this claim was clearly abandoned in his own requests to charge.)

(i) An extraordinary feature in regard to this claimed issue is that, according to plaintiff's own version of the manner in which the accident happened, the mud on his boots, if any, had absolutely nothing to do with it. The only time that the plaintiff ever mentions the mud, after referring to the mud that he claims was adjacent to the barrel track on the other side of the plant, was when his own counsel interrogated him as follows (R. 53):

> "Q. At the time you performed that operation following picking up the cars over on the distillery track, were your boots muddy?
>
> A. Yes, they were muddy. They were bound to have been muddy. There were mud that we had been wading in, walking in, in the back track where we had picked these two cars up.
>
> Q. All right, sir. But, nonetheless, you did get up the ladder and on that brake platform?
>
> A. Yes, sir."

(Note in the above that plaintiff again refers only to mud found in the "back track," which is the same as the "barrel track" marked on Df. Ex. 4.)

Plaintiff does not claim that any mud on his boots had anything to do with his activities in and about braking of the box cars, but, on the contrary, repeatedly states that he was thrown from the braking platform as a result of the impact of the cars, while his feet were firmly planted on the brake platform and his hands had a firm grip on the brake wheel. Following are excerpts from his testimony:

> When he mounted to the brake platform, he took a position facing the car "with my feet firmly on the brake platform" (R. 53).
>
> At the time of the impact, "I was standing on the platform, the brake platform, with a firm foothold and both hands on the brake wheel" (R. 58).
>
> "When the two cars came together I was there holding on the brake wheel with a strong grip and as they came together there was a large crash and I felt myself going through the air and I landed on this end gravel car with my head and shoulders" (R. 61).
>
> In answer to questions by the Court, he stated that his hands were gripping the brake wheel, including his left hand which also held the lantern, that his feet "were firmly on the brake platform" and that "after my hands and feet were jerked loose, I knew I was falling but there was nothing to grab there after I was jerked loose" (R. 95-96).

Nowhere in his account of the accident did plaintiff intimate in any way that his feet were caused to slip from the brake platform due to any mud on his boots, or, in fact, that they were caused to slip at all, and his repeated statements to the effect that he was violently thrown from the brake platform while his feet were firmly planted and his hands were firmly gripping the brake wheel are wholly inconsistent with any such theory.

Even if a causal connection had been shown between the acquisition by the plaintiff of mud on his boots and the accident, it could hardly be said that defendant railroad was guilty of negligence in this respect. Railroads are operated at night, as well as in the daytime. They are operated in all kinds of weather. That a railroad is not responsible for weather conditions or for ordinary accumulations of mud and water would scarcely seem to require a citation of authority. To say that a railroad must so construct or ballast every portion, not only of its own roadbed and yards, but of every side and spur track situated on the property of private industries (which was the case here) so as to prevent ordinary accumulations of mud resulting from normal climatic conditions from time to time would impose a duty not only extraordinary bu impossible to carry out.

Even where snow or ice accumulates on steps or running boards, a railroad is not bound to anticipate that the employee will fail to exercise due care in using available means to remove same: *McGivern v. Northern Pac. Ry. Co.*, 132 Fed. 2d 213 (C. C. A. 8th Circuit, 1942); *Missouri Pac. R. Co. v. Aeby*, 275 U. S. 426, 48 S. Ct. 177 (1928). See also: *N. Y. C. & St. L. R. Co. v. Boulden*, 63 Fed. 2d 917; *International Cotton Mills Co. v. Pernod*, 244 Fed. 723 (C. C. A. 1st Circuit, 1916); *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 S. Ct. 835.

In the present case the accumulation of mud, if any, on plaintiff's boots was under his sole control and he had every opportunity to remove same, if he considered it necessary or advisable. Plaintiff abandoned the claim made in his complaint that he was not given such opportunity because the facts obviously refute any such claim.

When, however, it also appears that plaintiff has not only failed to produce any evidence that the mud condition contributed in any way to the accident, but, in fact, by his own story, has definitely established the contrary, to engage in further argument would seem to be an unnecessary laboring of the point. There is no evidence in this entire record on which the jury could have properly found that this alleged mud condition had anything to do with the accident, and therefore the issue was improperly submitted to it.

There are undoubtedly cases where the acts contributing to an accident or injury are such that it would be impractical or improper to attempt to segregate them because they are all part of one pattern. Such a case was *Union Pac. R. Co. v. Hadley,* 246 U. S. 330, 38 S. Ct. 318. In that case the several acts of the various employees involved, including the train dispatcher, the conductor, and the deceased himself were so interwoven that it was impossible to say, under the conditions then existing, that they did not each of them contribute to the deceased's injuries. Similarly, in *Blair v. B. & O. R. Co.,* 323 U. S. 600, 65 S. Ct. 545, there were various interwoven circumstances forming what the court called a "single pattern." Actually, in the Blair case the court was not passing upon the specific question here involved, because it does not appear that the defendant was complaining of anything except that there was not sufficient evidence to warrant the verdict at all.

In the present case, the court left the issues to the jury in such manner that we are unable to say that the jury did not base its decision in part, or even wholly, upon the alleged negligence of the railroad in directing and requiring plaintiff to work in the yard under muddy conditions, and this notwithstanding that the only evidence

shows what little mud plaintiff got on his boots was some time before the accident, during which time he had plenty of opportunity to clean his boots, and notwithstanding that plaintiff's own evidence affirmatively shows that the mud had nothing whatever to do with the accident.

Conclusion

It should, perhaps, be pointed out that defendant railroad company made the additional claim upon its appeal to the Court of Appeals that the verdict of the jury was grossly excessive, and that the trial court had abused its discretion in refusing to grant a new trial upon that ground. As the Court of Appeals did not find it necessary to pass upon this question, we are unable to say what its views in that respect are. It would seem, however, that if Banning's petition for a writ of certiorari should be allowed, and if the Court of Appeals should be found in error in respect of all the rulings actually made by it, it would be necessary in such case that the cause be remanded to the Court of Appeals for a determination of that question, the allowance of which in favor of defendant railroad would likewise presumably result in the granting of a new trial. We mention this simply to preserve the point in the event of the allowance of Banning's petition. Respondent respectfully submits that for the reasons above set forth, the petition of Lester E. Banning for a writ of certiorari should be denied.

CLIFFORD B. LONGLEY,
HENRY C. BOGLE,
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Counsel for Cross-Petitioner.

CROSS-PETITIONER'S BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

Opinion of the Court Below

Opinion of the United States Court of Appeals, Sixth Circuit, filed April 5, 1949, is found on pages 406-412 of the record.

Basis of Jurisdiction

Jurisdiction is invoked under Section 1254-(1) of Title 28 United States Code, as enacted by the Eightieth Congress, Second Session, 1948, effective September 1, 1948, and Rule 38-(5) of the Rules of the Supreme Court.

Statement of the Case

Two and only two issues of negligence were submitted to the jury as follows (R. 331):

> "Plaintiff has charged in his complaint that the defendant failed to furnish him a safe place in which to work, in two respects; first, that he was directed and required to work in the yard under muddy conditions, so that his boots became slippery and covered with mud; and, second, that defendant dropped the car upon which plaintiff was riding in the performance of his duties, at such a high, dangerous and excessive rate of speed that plaintiff did not have the opportunity to bring it to a stop by means of the braking apparatus which he was required to operate before it collided with the train of parked cars standing upon the track, with brakes set, so that plaintiff was thrown therefrom to the ground and road bed, sustaining injuries complained of."

Cross-petitioner, defendant below, moved for a directed verdict (R. 290-291); it requested specific instructions to eliminate each of these issues of negligence (R. 357); it made timely objection under Rule 51 both to the submission of these issues and to the court's failure to grant defendant's several requests to eliminate same (R. 346-348); and it made a motion for judgment notwithstanding the verdict, and for a new trial in the alternative (R. 364-382). The District Court denied both the motion for judgment notwithstanding the verdict and the motion for new trial and entered a judgment on the verdict of the jury in favor of plaintiff (R. 389-391). The Court of Appeals sustained the District Court in denying the motion for judgment notwithstanding the verdict, but granted a new trial, finding that the District Court committed four separate errors, namely, that it improperly submitted the so-called "mud issue" and that it committed errors in the reception and rejection of certain testimony (R. 405-412).

It is the claim of cross-petitioner that its motion for judgment notwithstanding the verdict should have been granted and judgment entered for the defendant railroad; and inasmuch as the Court of Appeals has found that one of the two issues was improperly submitted, the sole question on this cross-petition is whether there is sufficient evidence to warrant the submission of the other alleged issue, namely, that pertaining to the alleged excessive speed at which the box cars on which plaintiff Banning was riding were switched or "dropped."

Plaintiff charged in its declaration that "defendant's agents and servants carelessly and negligently pushed and kicked said box car to be so switched in and upon said track with such violence that plaintiff could not control and stop the same in time to prevent a violent collision with said standing cars on said switch, causing plain-

tiff to be dislodged from his position on said car and to be thrown therefrom and injured as aforesaid" (R. 3).

The Court of Appeals has pointed out in its opinion how the drop switch was made (R. 407). A more detailed statement is as follows:

The gondola cars were left on the main track with their brakes set, the southerly end of this string being not less than 200 feet north of Harrison Avenue (R. 231, 266).

The Diesel engine then continued backing southward along the main track, pushing the two box cars ahead of it, across Harrison Avenue, past the switch leading into the distillery track (this point being marked "Point of switch—distillery track" on Df. Ex. 4), to a point estimated by plaintiff to be about 300 feet south of that switch (R. 37, 38, 41). During this movement, plaintiff was standing on the metal step or so-called stirrup, near the end of the box car which was next to the Diesel engine. Exhibit 1 is a photograph taken by defendant of this particular box car MEC 5256. It shows the brake at the end of the box car, the platform below the brake, on which the brakeman could stand while operating the brake, and two ladders at the corner of the box car, one on the end of the box car immediately adjacent to the platform and brake, and the other on the side of the box car next to the end, permitting the brakeman to swing from the side ladder to the end ladder and thence to the braking platform. Projecting below the seven main rungs of the side ladder is the metal step on which plaintiff stood at this time, in a position which would enable him to pull the coupling pin by means of a lever which appears below the end ladder (R. 49-50).

The switching crew was now in a position to make a so-called "drop switch" or "flying switch" whereby the

Diesel engine would be directed along the side track or so-called "distillery track" and the two box cars would be directed north along the main track, to be coupled onto the gondola cars standing several hundred feet north of Harrison Avenue (R. 48).

Plaintiff was thoroughly familiar with this type of switching, and had performed similar operations on defendant railroad some twenty-five or thirty times previously (R. 59, 74-75).

This maneuver was actually carried out in the following manner: The other brakeman, Smalley, was stationed in the middle of Harrison between the main track and the distillery track, to protect traffic (R. 40, 238). The conductor, Toombs, stood on the east side of the main track, at the point marked on Defendant's Exhibit 4 "Point of switch—distillery track," for the purpose of throwing that switch by means of the hand lever (R. 49, 216). Toombs gave the engineer the signal, and the Diesel engine started rolling northward toward the distillery track switch, at a speed fast enough to get the cars rolling, which speed was estimated at about twelve to fourteen miles per hour as it approached the switch; whereupon Toombs gave the engineer the signal to slack off so the cars could be uncoupled. This uncoupling was accomplished by plaintiff pulling out the coupling pin by means of a lever as he stood on the metal step referred to above, while holding on to a rung of the ladder with his left hand in which he also held the electric battery lantern (Pl. Ex. 3). The engine then speeded up slightly and passed down into the distillery track, Toombs immediately threw back the switch or "relined" it, and the two box cars proceeded under their own momentum northward on the main track toward Harrison Avenue (R. 48-51, 216-217, 248-249, 264).

After the two box cars, with the brakeman riding the front or northerly end of the first of these cars, passed the distillery switch and proceeded northerly toward Harrison Avenue, the Diesel engine returned back over the distillery track onto the main line, and Toombs "relined" the distillery track switch to permit the engine to proceed northerly over the main track in the same direction as the two box cars had moved. Toombs then walked diagnoally across the main track and the distillery track to the Derail (so designated on Df. Ex. 4) on the west side of the distillery track, he locked this Derail (which had been opened to permit the switch engine to come down the side track), then crossed back to the east side of the main track, signaled the engineer to come ahead, and got on the side step of the Diesel as it passed him (R. 217, 226, 250-251).

It was about eight o'clock in the evening, there was a "misting" or light rain at the time, and, although night had fallen, there was apparently enough visibility to enable plaintiff to see for some distance, as he testified that as the box cars approached Harrison Avenue, he saw the other brakeman standing there, where the blinker lights were working at the crossing, and that as he was nearing the crossing he turned his head and took an observation of the gondola cars which stood several hundred feet north of Harrison Avenue (R. 56-57).

(The above facts are undisputed. While defendant introduced testimony as to other facts, including testimony of several witnesses, as to admission by plaintiff that the accident happened in an entirely different manner from that which plaintiff claimed on the trial, we of course, for the purpose of the motion for directed verdict, accept plaintiff's version as true, and accordingly the following facts, being plaintiff's own version, are accepted as true.)

Plaintiff's version is as follows (R. 52-61): After uncoupling the box cars from the engine, plaintiff climbed the side ladder near the end of the box car to about the fifth round, then "switched around to the end ladder" and "stepped over to the brake platform" and took his position there facing the car "with my feet firmly on the brake platform." He continued holding the lantern while he took hold of the brake wheel, but there was nothing about holding it that interfered with the operation of his hands (R. 54). He made sure that the cam, which engages the ratchet to hold the brake wheel as it is applied, was in the proper position and started to apply the brakes. He testified that by the time he started to apply the brakes he was "nearing the road crossing, Harrison Avenue" (R. 55). It was at this time that he took an observation of the gondola cars by turning his head and looking over his shoulder. The blinker lights were working at the crossing and the other brakeman was standing there (R. 56). Based on his experience in driving automobiles and his observation of the speed of railroad equipment, plaintiff testified that, in his opinion, at the time he made his observation just before entering Harrison Avenue, the speed of the box cars was "around 10 or 11 miles an hour," having decreased somewhat from the time they were uncoupled (R. 57). From this point he estimated it was still some 350 or 400 feet to the first of the gondola cars (57). He testified that the box car on which he was riding came in contact with the gravel train (that is, the gondola cars) while he "was standing on the platform, the brake platform, with a firm foothold and both hands on the brake wheel," that he was then putting on the brakes to slow the car down to where he could get it stopped before it hit the other cars, although it was not his intention to bring it to a dead stop until it contacted those cars, so it would couple to them. He estimated that the speed of

the box cars at the time of the impact was "around 6 or 7 miles an hour," that he kept applying the brake by turning the wheel and observing the end of the car that he was coming into, but was unable to bring it to a lower speed.

He testified that from the time he started applying the brakes before entering Harrison Avenue, up to the point of the impact, he made constant application of the brakes (R. 58, 68); that there was "an awful crash when it hit" (58); that he was then holding on to the brake wheel with a strong grip, but as the cars came together, "I felt myself going through the air and I landed on this end gravel car with my head and shoulders," then fell off on the roadbed on his back (R. 61).

The Court of Appeals Erred in Deciding That the District Court Was Correct in Submitting to the Jury the Issue of Alleged Excessive Speed.

The evidence of excessive speed is insufficient to warrant submission to the jury. The point at which plaintiff pulled the pin to cut the two box cars off from the switch engine when the drop was made must be assumed to have been at least one car-length south of the "Point of switch —distillery track" (See Df. Ex. 4). This would mean that this point was about 417 feet south of the south line of Harrison Avenue (393 feet to "Point of switch— distillery track"—Df. Ex. 4; plus at least 40 feet for the length of a box car—see R. 279; minus 16 feet for one-half the width of Harrison). In other words, according to plaintiff's own testimony, the distance from the point where he uncoupled the pin at the beginning of the switching movement until he started applying the brakes was about 417 feet. Taking the highest speed, as claimed by him, at which the cars started on this movement, namely

14 miles an hour, and the speed at which he claimed they were going as they entered Harrison Avenue, namely, 11 miles per hour, we have an average speed over this distance of 12½ miles per hour. This means that the box car on which plaintiff was riding took something over 22 seconds to cover the distance just referred to.

The distance from the south side of Harrison Avenue to the first of the gondola cars north of Harrison was, according to plaintiff's testimony, at least 300 feet (R. 37, 49). Defendant's witnesses, however, pointed to a spot on defendant's Exhibit 4 indicating that the first of these gondola cars was from 200 to 230 feet north of the north edge of Harrison Avenue (R. 231, 266). Taking the shortest distance testified to as being the most favorable to plaintiff, that is, 200 feet, and adding 33 feet for the width of Harrison Avenue, we find that from the time plaintiff claims to have started applying the brake to the point of impact, the box cars had at least 233 feet to go. As he testified they were going not over 11 miles an hour at Harrison and not more than 7 miles at the point of impact with the gondola, this gives an average speed of 9 miles per hour for such distance of 233 feet. At such speed, it would take the box cars more than 17 seconds to cover the latter distance. A calculation for the entire distance from the point of pulling the coupling to the point of impact with the gondolas shows, according to plaintiff's own testimony, that it took the box cars upwards of 40 seconds to cover this entire distance.

Although to the eyes the track appeared to be substantially level, actually the cars were going up a slight grade as they approached Harrison Avenue, but after arriving at Harrison Avenue until they coupled with the gondola cars, they were proceeding on an absolutely level grade (R. 176).

Assuming that plaintiff is giving the correct version of the facts when he testifies that he was thrown from the brake platform on account of the heavy impact when the box cars coupled onto the gondolas, there is still nothing in his testimony that raises any inference of negligence on the part of the railroad for the jury to pass upon. He does not claim that there was any difficulty in climbing the side ladder, crossing over to the end ladder, then stepping on to the brake platform. So far as the evidence shows, the time it took him to check on the cam to see that it was in proper position was negligible. He states that he started to apply the brakes as he was nearing Harrison Avenue. He took an observation over his shoulder of the position of the gondola cars, with which he must already have been familiar. At this point, at least 20 seconds had elapsed from the time he started up the ladder. There is no explanation why he did not apply the brakes earlier if he felt it was necessary. The answer must be that, as a matter of judgment he applied the brakes when and to the extent that he felt to be necessary. He still had over 200 feet to go. It was a matter within his own judgment and discretion at what speed to permit the box cars to couple onto the gondolas. He testified it was not his purpose to stop short, but to permit an automatic coupling. At no time either in the pleadings or in the evidence has it been claimed that the brakes, or any other equipment, were in any manner defective. According to his own testimony, the box cars were slowed down from a speed of 10 to 11 miles at the crossing to about 6 or 7 miles an hour at the time of contact with the gondolas. He says he was unable to bring it to a lower speed, but there is nothing in the evidence to indicate in any way that this was due to any negligence on the part of the railroad or any of its employees other than plaintiff himself. His story is perfectly consistent with the

failure on his own part either to apply sufficient pressure to the brake when he had plenty of opportunity to do so or with his own failure of judgment. It is consistent with the assumption that he may have waited too long or that he may not have used enough force in applying the brakes.

The claim made by plaintiff on this point is that the box car was dropped "at such a high, dangerous and excessive rate of speed that plaintiff did not have the opportunity to bring it to a stop by means of the braking apparatus which he was required to operate before it collided with the train of parked cars" (R. 3, 331, 351). We submit that the record is devoid of any legal proof that this is true. Plaintiff's and defendant's testimony is substantially in accord as to the speed of the box cars at the time of the drop, plaintiff testifying that it was about 12 to 14 miles per hour, and defendant's fireman testifying it was about 12 miles per hour. There is no evidence in this case that under the conditions here existing, this was an improper or excessive rate of speed at which to start this operation. Nor is there any evidence that the box cars could not have been properly controlled during the time and distance involved. It is true that the Court permitted the plaintiff to testify, over defendant's objection (R. 59-60), that he had never ridden on freight cars that came into contact with another portion of the train at as high a rate of speed as that which he described here, and that he had never ridden on a car "that had been connected in or shoved in at that rate of speed."

The Court of Appeals, however, sustained defendant's claim that this testimony was improperly permitted for the reason that no foundation was laid to show that the circumstances, distance, grade, or other conditions of some 25 or 30 flying switches that plaintiff had testified he had

previously made were similar to the present switching operation, and obviously, the plaintiff's statement has no evidential value whatsoever in proving or tending to prove that this rate was other than normal or proper under the conditions here involved. The 25 or 30 flying switches that plaintiff had engaged in (R. 59) were made at other places up and down the defendant railroad, some of them in Ohio, and none of them at the point involved here (74). For all we know, they may have been downgrade or involved very short distances. There is no evidence in this record either that the rate of speed on this occasion was improper or even that the box cars, under their own momentum and without any braking whatever, would have continued on down to connect to the gondola cars had they been started out at a less speed.

Plaintiff has not made out a case for the jury under the Federal Employers' Liability Act until he has affirmatively shown that defendant has been negligent, that is, that it has failed to exercise reasonable or ordinary care in view of all the circumstances, and that such failure was in whole or in part the proximate cause of the injury: *McGivern v. Northern Pac. Ry. Co.*, 132 Fed. 2d 213, at 217; *Murphy v. Lehigh Valley R. Co.*, 158 Fed. 2d 481 (CCA Second Circuit, 1946); *Fantini v. Reading Co.*, 147 Fed. 2d 543 (CCA Third Circuit, 1945); cert. den. 325 U. S. 856, 65 S. Ct. 1185; *Edwards v. B. & O. R. Co.*, 131 Fed. 2d 366 (CCA Seventh Circuit, 1942); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409; *Barry v. Reading Co.*, 147 Fed. 2d 129 (CCA Third Circuit, 1944), cert. den. 65 S. Ct. 912, 1022.

The weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before the case may be properly left to the jury: *Brady v. Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232 (1943).

To justify submitting the plaintiff's case to a jury, the evidence in his favor must be substantial and this means more than a mere scintilla; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion: *Mutual Benefit H. & A. Assn. v. Snyder,* 109 Fed. 2d 469 (CCA Sixth Circuit, 1940); *Roth v. Swanson,* 145 Fed. 2d 262 (CCA Eighth Circuit, 1944); *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197, 229; 59 S. Ct. 206, 217.

A verdict should be directed for defendant when the evidence produced by plaintiff is such that the jury could not properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed, or where the court in exercise of sound judicial discretion should set aside such verdict if rendered: *Gunning v. Cooley,* 281 U. S. 90, 50 S. Ct. 231 (1930); *Mutual Benefit H. & A. Assn. v. Snyder,* 109 Fed. 2d 469 (CCA Sixth Circuit, 1940); *Strider v. Penn. R. Co.,* 60 Fed. 2d 237 (CCA Sixth Circuit, 1932).

The case should not be permitted to go to the jury when any verdict in favor of plaintiff must necessarily be based upon mere speculation or conjecture: *Atchison, T. & S. F. Ry. Co. v. Toops,* 281 U. S. 351, 50 S. Ct. 281 (1930); *Penn. R. Co. v. Chamberlain,* 288 U. S. 333, 53 S. Ct. 391 (1933).

In *Cunningham v. Great N. R. Co.,* 73 N. D. 315, 14 N. W. 2d 753 (1944), a case under the Federal Employers' Liability Act, the Court set aside the verdict and ordered judgment entered for the defendant on the ground that "the state of the evidence is such that fair-minded men in the exercise of reason and judgment could not have reached the conclusion that the person whom the jury by its verdict found to have been negligent in fact had been

negligent." And see *Eckenrode v. Pennsylvania R. Co.* 69 S. Ct. 91.

We submit that the evidence in this case is such that fair-minded men in the exercise of reason and judgment could not have reached the conclusion that defendant was negligent or that any of its acts were the proximate cause of the injury to plaintiff.

While the jurors may refer to their general knowledge upon matters notorious and unquestioned (IX *Wigmore on Evidence* (Third Edition), Sec. 2570), neither they nor the court can take judicial notice of the length of time in which a train can be stopped under a given set of facts; such testimony can only be supplied by experts or other witnesses who have had experience in the stopping of trains: *Keppler v. N. Y. Cent. R. Co.*, 263 App. Div. 199 (N. Y. 1942)—a case under the Federal Employers' Liability Act.

In the present case, to find that defendant shoved in the cars at an excessive rate of speed, the jury had nothing before them but statements of the plaintiff which, as we have pointed out above, are entirely consistent with the exercise of care by defendant and, indeed, with the assumption that plaintiff himself merely failed to act when he should have acted or had a lapse of judgment.

The Court of Appeals in its opinion states: "There was a conflict in the evidence as to the speed at which the switching operation was performed." As applied to the only point at which the rate of speed as bearing on defendant's negligence would be pertinent, namely, the point at which the two box cars were uncoupled from the switching engine before the latter went down into the side track, this statement of the Court of Appeals does not appear to conform to the record. There was no con-

flict in the testimony as to the speed at which the box cars were going when they were cut loose from the switch engine. Plaintiff Banning testified that the Diesel engine just prior to the uncoupling was going at a speed fast enough to get the cars going, which speed was estimated by him to be 12 to 14 miles per hour as it approached the switch (R. 57), and defendant's witness Hitchingham, the fireman, testified that at that time the speed was about 12 miles per hour (R. 264). Both men testified that the engine slowed down to create slack (R. 80, 264), which would doubtless slow down the box cars somewhat. The only conflict in the testimony as to speed is that between the testimony of Banning that the box cars were going 10 or 11 miles per hour as they crossed Harrison Avenue, and the testimony of the brakeman, who was standing at Harrison Avenue, who estimated their speed at that time at 3 or 4 miles per hour. For our purpose here, we accept Banning's testimony as to this speed.

The question is this: Was any evidence introduced in this case from which the jury would have the right to find that the speed of 12 to 14 miles per hour at which the switching crew cut loose the box cars from the engine was excessive under the conditions relative to grade, distances involved, etc. Banning himself was in control of the box cars from that point on. We submit that there is nothing to show that that speed was excessive under these conditions, and that Banning's testimony is entirely consistent with failure of judgment or negligence on his own part and does not show negligence on the part of other employees of the railroad.

Conclusion

Cross-petitioner respectfully requests, for the reasons stated, that a writ of certiorari issue out of this court to review the decision of the United States Court of Appeals for the Sixth Circuit in respect of the matter referred to.

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